Supreme Court, U.S.
FILED
MAR 18 1994
OFFICE OF THE CLERK

No. 93-1297

In The

Supreme Court of the United States

October Term, 1993

THEODORE L. LeBLANC,

Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that plaintiff had not adduced sufficient evidence for a reasonable factfinder to conclude that Great American's legitimate business explanation for plaintiff's discharge was a pretext for age discrimination.

2. Whether the Court of Appeals should have considered plaintiff's statistical evidence under a disparate impact theory, although plaintiff never advanced such theory before the Court of Appeals in this individual discharge case alleging disparate treatment on account of plaintiff's age.

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

All parties to the proceeding below are reflected in the case caption. In accordance with Supreme Court Rule 29.1, Respondent Great American Insurance Company makes the following disclosure:

1. Parent companies:

   American Financial Corporation
   Great American Holding Corporation

2. Subsidiaries (except wholly owned subsidiaries):

   Penn Central Corporation
   American Annuity Group, Inc.
   American Financial Enterprises, Inc.
   General Cable Corporation
   Great American Communication Company

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BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent, Great American Insurance Company ("Great American"), respectfully prays that this Court enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit filed by the Petitioner, Theodore L. LeBlanc ("LeBlanc").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 6 F.3d 836. Petitioner's App. 1a-30a.[1] The Court of Appeals denied LeBlanc's petition for rehearing in an order entered on October 25, 1993. App. 34a-35a. The District Court ruled from the bench on November 2, 1992. App. 36a-39a.

JURISDICTION

Great American concurs that jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. LeBlanc's Discharge[2]

Great American is an all lines insurance company with headquarters in Cincinnati, Ohio. In October 1990, when Great American discharged LeBlanc, it was divided into four geographic zones: Northeast, South, Midwest, and West. Great American was also divided into personal

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[1] References to Petitioner's Appendix will be abbreviated as "App." followed by the page numbers. References to the Joint Appendix filed with the Court of Appeals will be abbreviated as "A" followed by the page number.

[2] LeBlanc's "Statement of the Case" focuses almost exclusively on peripheral matters which are either immaterial or simply erroneous. Great American will further address LeBlanc's erroneous factual contentions, where relevant, in the argument section of this response.

or commercial lines of insurance business. At the time of his discharge, LeBlanc was employed in the Northeast Zone, commercial lines. Al Conte, the President of the Northeast Zone, commercial lines, was nearly 60 years old at the time he discharged LeBlanc. App. 6a-7a, 25a.

Great American hired LeBlanc in October 1980, as a branch manager for its Wheaton, Maryland office. LeBlanc was then 49 years old. App. 6a. Conte, at that time Vice President in charge of regional offices, interviewed LeBlanc and concurred in the decision to hire him. A56-57; A13-14. From 1980 through 1988, LeBlanc worked for Great American in Wheaton and then Silver Springs, Maryland. App. 6a-7a; A53-54. In January 1989, at the age of 57, LeBlanc consented to a transfer to eastern Massachusetts to serve as a commercial lines Agency Operations Representative ("AOR"). Conte, by then President of the Northeast Zone, commercial lines, approved LeBlanc's transfer, as well as LeBlanc's accompanying 16% pay raise. App. 7a.

LeBlanc joined Charles DeMartino, then 56 years old, as one of two AOR's in eastern Massachusetts. As an AOR, LeBlanc was expected to market Great American commercial lines business to independent insurance agents or brokers in eastern Massachusetts and to service those agents and brokers who were already selling Great American's commercial lines insurance. LeBlanc and DeMartino, who were nearly identical in age, were the only AOR's servicing eastern Massachusetts agents until LeBlanc's discharge. App. 7a. Some of the remaining, less profitable eastern Massachusetts agents were serviced by phone or mail from the Lancaster, Pennsylvania branch office. A57.

In August 1990, Al Conte was first advised by Thomas Hayes, Executive Vice President of Great American in Cincinnati, that, due to the worsening financial situation in the Northeast Zone, Conte would have to submit a leaner budget to corporate headquarters. Although Conte sought to reduce expenses without cutting personnel, he determined in late September 1990, that some personnel cuts would be required. Accordingly, in mid-October 1990, Conte decided to eliminate or leave vacant five positions: (1) AOR, eastern Massachusetts, terminating LeBlanc, age 58; (2) Profit Center Manager, Hartford, terminating Dwight Bowie, age 38, whose duties were assumed by Robert McGuigan, age 59; (3) Senior Staff Underwriter, terminating William St. George, age 47; (4) AOR Manager, Syracuse, New York, a position vacated by the resignation of Tim Johnson, age 26; and (5) a Hartford, Connecticut underwriting position which had been vacant for some time. App. 7a-8a; A59-60. Thus, only two of the five job eliminations affected individuals over the age of forty.

Great American selected LeBlanc's position, in particular, for a number of interrelated, business reasons. Massachusetts was very unprofitable due to a downturn in the region's economy, high fixed expenses and state residual assessments against Great American's workers' compensation and commercial automobile lines of insurance. These residual assessments, or pooling requirements, exceeded $1 million annually in Massachusetts. App. 18a; A58, 60-61. In addition, eastern Massachusetts was an extremely small geographic area (in contrast to the other Northeast Zone territories) which was already being serviced by two experienced AOR's, LeBlanc and

DeMartino. Therefore, Conte believed that eastern Massachusetts would be the least damaged by the elimination of a full-time AOR position. Finally, Conte chose to retain DeMartino (just six months younger than LeBlanc), rather than LeBlanc, because DeMartino had a longer tenure in Massachusetts and a claims background which provided Great American with greater versatility in the event of hurricanes, storms or floods. App. 19a.

On October 19, 1990, Great American representatives met with LeBlanc and informed him that his AOR position had been eliminated. At that meeting, LeBlanc was told that the decision was based on budget constraints, not his individual performance. App. 8a; A32. DeMartino, the remaining eastern Massachusetts AOR, was immediately assigned responsibility for LeBlanc's most productive agents. The remaining agents were assigned to various underwriters in the Lancaster branch office to which LeBlanc and DeMartino had reported. App. 8a. Over nine months later, in July of 1991, after Conte's retirement, Great American transferred responsibility for eastern Massachusetts from the Lancaster office to Windsor, Connecticut. As a temporary measure to ease the transition for the affected agents, Great American assigned a 30 year old Connecticut AOR, Anne Daley, to service several eastern Massachusetts agents. Between July and September 1991, Daley serviced a few of LeBlanc's former agents in addition to her existing agents in western Massachusetts, which was not part of LeBlanc's former territory. Daley left Great American in September 1991 and, since then, DeMartino has been the only AOR servicing agents in eastern Massachusetts. App. 8a-9a.

B. Proceedings Below

LeBlanc filed suit alleging that, in discharging him, Great American had violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") and state discrimination laws.[3] Great American moved for summary judgment which was granted by the District Court on the grounds that LeBlanc's evidence was insufficient as a matter of law either to make out a prima facie case of age discrimination or, alternatively, to rebut the "age neutral ground for discharge" proffered by Great American. App. 38a. LeBlanc appealed. The Court of Appeals questioned whether LeBlanc's evidence was sufficient to even make out a prima facie case. *LeBlanc v. Great American Insurance Company*, 6 F.3d 836, 844 (1st Cir. 1993). After assuming, without deciding, that LeBlanc had established a prima facie case, the court held that Great American had "articulated a legitimate, non-discriminatory reason for LeBlanc's dismissal." 6 F.3d at 844. Thus, noted the court, "the presumption of age discrimination raised by LeBlanc's prima facie case" vanished and the court was left to determine "whether the evidence in its entirety, would permit a reasonable factfinder to infer that Great American's decision to terminate LeBlanc was motivated by age animus." *Id.* at 845.

The Court of Appeals examined LeBlanc's evidence of pretext and his statistical evidence, concluding that "LeBlanc's arguments are based largely upon conclusory allegations, improbable inferences, and unsupported

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[3] LeBlanc initially filed suit in the Eastern District of Pennsylvania. This case was transferred to the District of Massachusetts on October 30, 1991.

speculation." *Id.* at 849. In particular, the court considered in detail each of LeBlanc's attacks on Great American's explanation and found that none raised triable issues of fact as to whether that explanation was a sham or pretext. *Id.* at 845-47. Furthermore, the court agreed with the District Court that LeBlanc's statistical evidence was insufficient, as a matter of law, to raise an inference as to age discrimination "[i]n a disparate treatment case such as LeBlanc's. . . . " *Id.* at 848. As the court observed, the statistics were riddled with flaws and there was "no evidence whatsoever to connect the statistics to Great American's specific decision to dismiss LeBlanc." *Id.* Thus, contrary to LeBlanc's repeated and unsupported contention, the result below did not turn on any purported requirement that LeBlanc present "independent evidence of discriminatory animus."

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. LeBlanc's principal argument is that there are conflicts between the decision of the Court of Appeals and other recent circuit court decisions regarding the evidentiary standard applicable to summary judgment in light of this Court's decision in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). Petition, pp. 12-25. These purported conflicts are illusory for several reasons. *First*, the Court of Appeals' decision is not inconsistent with the rationale of this Court's decision in *Hicks*. To the contrary, in complete conformity with *Hicks*, the Court of Appeals merely held

that the evidence in its entirety, including LeBlanc's evidence of pretext, must be sufficient to raise a genuine factual issue as to whether his discharge was motivated by age-based animus. *Second*, upon closer examination, the purported "confusion" in the circuit courts presents no conflict which this Court need resolve. At minimum, it is premature for this Court to address alleged conflicts, if any, within individual circuits or predicated upon unpublished, non-precedential circuit court rulings. *Third*, and perhaps most importantly, it is unnecessary for this Court to address any purported conflicts because the Court of Appeals clearly found no genuine factual dispute as to whether Great American's explanation for LeBlanc's discharge was pretextual. Therefore, it is unnecessary to determine in this case whether the so-called "pretext plus" standard survives *Hicks*. In addition to the lack of conflicts requiring resolution by this Court, the decision below does not raise any important federal question. LeBlanc's disagreement with the Court of Appeals' interpretation of the evidence presented under the unique circumstances of this case is of no public significance.

LeBlanc's alternative contention, that the Court should decide whether plaintiffs may prove age discrimination under a disparate impact theory, is obviously makeweight and raises no issue requiring review by this Court. Petition, pp. 25-32. The disparate impact theory was never raised by LeBlanc in the proceedings below and was, hence, waived. In any event, a disparate impact theory is obviously inapplicable to these facts, as evidenced by LeBlanc's own arguments elsewhere in the Petition.

A. The Decision Below Does Not Conflict With This Court's Decision In *St. Mary's Honor Center v. Hicks*

LeBlanc's contention that the Court of Appeals' decision is at odds with this Court's holding in *Hicks* mischaracterizes both *Hicks* and the nature of the decision below. Petition, p. 25. In *Hicks*, a lawsuit alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, this Court was confronted with the narrow issue of whether "the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff." 113 S. Ct. at 2746. The Court held that the factfinder's rejection of the defendant's proffered reasons does not compel a judgment for the plaintiff. *Id.* at 2749. As the Court observed, the familiar *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), scheme for allocating the burden of production does not alter plaintiff's " 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.' " *Id.* at 2747, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Once the employer comes forward with a lawful explanation for its actions, the presumption of discrimination "simply drops out of the picture" and "the trier of fact proceeds to the ultimate question" of whether the employer discriminated against plaintiff. *Id.* at 2749.

Although *Hicks* arose on appeal from a bench trial, the Court of Appeals below recognized that its rationale also applies in the summary judgment setting. As the Court of Appeals observed, "once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before

becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age." *LeBlanc*, 6 F.3d at 843. In other words, the employee has the burden of establishing a genuine factual issue as to whether "the reason advanced by the employer for the adverse employment action constituted a mere pretext for unlawful age discrimination." 6 F.3d at 842. After a detailed examination of LeBlanc's purported evidence of pretext and the statistical evidence he proffered (*id.* at 845-49), the Court of Appeals concluded that "LeBlanc has adduced insufficient evidence for a reasonable trier of fact to infer that Great American's decision to terminate his employment in October 1990 was motivated by age animus." *Id.* at 849.

Contrary to LeBlanc's assertion, the Court of Appeals' decision is completely consistent with this Court's holding and rationale in *Hicks*. LeBlanc interprets this Court's statement in *Hicks* that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" (113 S. Ct. at 2749), as barring summary judgment whenever there is a factual dispute over the employer's explanation. The language of *Hicks* does not support such an interpretation.[4] As the Court emphasized later in *Hicks*,

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[4] The remainder of the *Hicks* quotation relied upon by LeBlanc clarifies the Court's reasoning on this point: "The factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 2749 (emphasis added). Thus, at best, disbelief of an employer's explanation

"nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 2751. It therefore follows, in accordance with *Hicks*, that once the employer proffers a lawful reason for its action, the plaintiff must at least raise a genuine factual dispute as to the ultimate required finding of discrimination. That is all the Court of Appeals here required. It did not insist upon any particular form of direct or indirect evidence of age discrimination. Rather, it merely reasoned that all LeBlanc's evidence (including his evidence of pretext) must raise a genuine factual dispute as to the ultimate issue of discrimination. There is thus no conflict between the rationale of *Hicks* and the decision below.

B. The Decision Below And The Decisions Of Other Circuit Courts Do Not Present A Conflict Which This Court Must Resolve

1. The Purported Conflicts Among The Circuit Courts Are Illusory, Or, Alternatively And At Minimum, It Would Be Premature For This Court To Address Alleged Conflicts

LeBlanc repeatedly refers to "conflicts" or "confusion" among the circuit courts over how to apply *Hicks* to the summary judgment setting. Petition, pp. 11, 15, 20, 25. In particular, LeBlanc contends that after this Court's

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may or may not support a finding of discrimination. Obviously, this will depend upon the state of the entire record and the inferences which can be fairly drawn by a reasonable factfinder.

decision in *Hicks* one line of cases follows the so-called "pretext only" approach to resolution of summary judgment motions,[5] while another line of cases adheres to the so-called "pretext plus" evidentiary standard.[6] Close examination of these authorities reveals that the purported conflicts are illusory. *First*, the majority of the cases LeBlanc cites are not even remotely pertinent.[7] *Second*, the fact that courts may emphasize different aspects

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[5] The "pretext only" cases, according to LeBlanc, include *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392 (6th Cir. 1993); *Kline v. Tennessee Valley Authority*, 1993 U.S. App. LEXIS 20286 (6th Cir. 1993) (not recommended for publication or citation pursuant to Sixth Circuit Rule 24); *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Bojda v. Black Dot Graphics, Inc.*, 1994 U.S. App. LEXIS 117 (7th Cir. 1994) (non-precedential order pursuant to Seventh Circuit Rule 53); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993); *May Sun v. Asian American Recovery Services*, 1993 U.S. App. LEXIS 22886 (9th Cir. 1993) (non-precedential opinion pursuant to Ninth Circuit Rule 36-3); and *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993).

[6] In addition to the decision below, LeBlanc refers to the following as "pretext plus" cases: *Bodenheimer v. PPG Indus.*, 5 F.3d 955 (5th Cir. 1993); *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994); *Gibb v. Kemp*, 1993 U.S. App. LEXIS 19025 (6th Cir. 1993) (not recommended for publication under Sixth Circuit Rule 24); *Booker v. C.R. Indus.*, 1993 U.S. App. LEXIS 31886 (7th Cir. 1993) (not recommended for publication or citation under Seventh Circuit Rule 53) and *Card v. Hercules, Inc.*, 1993 U.S. App. LEXIS 21631 (10th Cir. 1993) (not precedential pursuant to Tenth Circuit Rule 36.3).

[7] Several of the alleged "pretext only" cases are, in fact, indistinguishable from the decision below. *E.g., Mitchell, supra* (court affirms summary judgment for employer finding no factual dispute as to the employer's explanation for plaintiff's discharge); *Bojda*, 1994 U.S. App. LEXIS at *12 (court affirms

of this Court's rationale in *Hicks* in order to justify the result in specific cases is neither troublesome nor does it warrant intervention by this Court. For example, *Roush*, *Washington* and other so-called "pretext only" cases, unlike here, found substantial evidence of pretext. Indeed, several cited direct evidence of discrimination.[8] On the other hand, none of the so-called "pretext plus" cases even found a genuine factual dispute as to the employer's explanation. In other words, LeBlanc cites to no circuit court decision which has ever upheld summary judgment in the face of material factual disputes as to the employer's explanation. Thus, contrary to LeBlanc's

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summary judgment for employer in ADEA case finding that the employer's explanation was not a pretext for age discrimination). Other cases do not squarely address how *Hicks* applies to summary judgment proceedings. *E.g.*, *DeMarco*, 4 F.3d at 172 (court reverses summary judgment in ADEA case on narrow ground that ADEA applies to religious institutions, without reaching the merits of the underlying ADEA claim); *Hairston*, 9 F.3d at 921 (court reverses summary judgment in ADEA case, based not upon *Hicks*, but upon court's view that summary judgment is generally unsuitable in Title VII cases once prima facie case is established). Finally, many of the authorities on which LeBlanc relies are procedurally distinguishable. *McNabola*, *supra* (appeal from jury verdict in race discrimination suit); *Roush*, *supra* (appeal after jury verdict in ADEA case); *Barrow*, *supra* (court affirmed summary judgment for employer in ADEA case on separate ground that no prima facie case was even established) and *Gibb*, *supra* (review of bench trial decision under clearly erroneous standard, with deference paid to trial court's credibility determinations).

[8] *Roush*, 10 F.3d at 396 (court cites age-related remarks such as "old bag" or "old gummer"); *Washington*, 10 F.3d at 1434 (direct evidence of racial discrimination shown by testimony regarding racial tension).

assertions, there is simply no irreconcilable conflict among the circuit courts as to whether, in the event of a factual dispute as to the employer's explanation, summary judgment is warranted.

Alternatively, and at minimum, it would be premature for this Court to address the conflicts, if any, alleged by LeBlanc. Six of the supposedly conflicting authorities are decisions which have been expressly designated by the applicable circuit court rules as non-precedential and non-binding. See cases listed in footnotes 5 and 6, *supra*. The circuit courts in question may well modify or completely alter their views in later, published decisions, obviating the need for review by this Court. Thus, any finding of conflict based upon such non-precedential decisions would be premature. Furthermore, if there are conflicts *within* individual circuits, as LeBlanc contends, it would likewise be premature for this Court to intervene. There are other avenues available for resolution of intra-circuit conflicts, if any, including *en banc* review.

2. It Is Unnecessary To Resolution Of This Case To Even Address Purported Conflicts In The Circuits

Even assuming, *arguendo*, that LeBlanc has identified some conflict among the circuits as to the summary judgment standard post-*Hicks*, this case is not the proper vehicle to resolve such purported conflict. Here, despite LeBlanc's strained assertions to the contrary (Petition, p. 16), the Court of Appeals' decision did not depend upon application of a higher, "pretext plus" standard of proof.

Rather, the Court of Appeals examined LeBlanc's evidence of pretext and, in each instance, found that it raised no factual dispute as to Great American's legitimate business explanation for LeBlanc's discharge. For example, the court concluded that the layoff of only three employees did not raise any inference that "Great American's stated reasons were mendacious." 6 F.3d at 846. In addition, the court reasoned that it would require "unsupported speculation" to conclude that the previous hiring of younger AOR's elsewhere in the Zone, shed any light on Great American's explanation. *Id.* at 846. The court also found that LeBlanc had not adduced evidence from which a factfinder could reasonably conclude that Great American's explanation of financial difficulty was "a sham." *Id.* at 847. Finally, the court was not persuaded that evidence of Conte's failure to consult with other managers about LeBlanc's discharge, even if true, "undermine[d] the justifications" Great American provided for its decision, particularly where Conte, himself nearly 60 years old, had promoted LeBlanc less than two years earlier. *Id.* In sum, the question LeBlanc poses in his Petition is irrelevant because, regardless of the evidentiary standard, the Court of Appeals would have affirmed summary judgment.[9]

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[9] Indeed, although the Court of Appeals assumed, for purposes of the appeal, that LeBlanc had made out a prima facie case, "it [was] not clear" to the court that the District Court had erred in granting summary judgment on that alternative ground. *Id.* at 844. In particular, the court found unconvincing LeBlanc's evidence as to the fourth element of the prima facie case – failure to treat age neutrally or retaining younger persons in the same position. *Id.*

C. The Decision Below, Properly Construed, Does Not Raise Any Important Federal Question Requiring Resolution By This Court

LeBlanc's contention that "[r]eview of this case is vitally important to the enforcement of the nation's anti-discrimination laws" is also misguided. Petition, p. 10. His argument rests upon the erroneous premise that the Court of Appeals affirmed summary judgment for Great American based upon the lack of direct evidence of age discrimination beyond evidence of pretext. Instead, the Court of Appeals, consistent with *Hicks*, merely held that the record as a whole, including LeBlanc's supposedly "strong evidence of pretext," must permit a reasonable factfinder to conclude that Great American's explanation was a pretext for discrimination. LeBlanc's alarmist prediction that plaintiffs who successfully rebut their employer's explanation for discharge will nevertheless be deprived of jury trials is simply not borne out by precedent, as Great American has already established. The notion that circuit courts, post-*Hicks*, are upholding summary judgment in the face of material factual disputes as to the employer's explanation is a fiction invented by LeBlanc in an effort to obtain review of a result he dislikes.

LeBlanc's criticisms of the decision below would necessarily require this Court to review individualized factual determinations which are of no significance to other cases. This is apparent from LeBlanc's Petition, which is replete with detailed quibbles over the Court of Appeals' interpretation of his evidence. LeBlanc contends that the Court of Appeals "sid[ed] with Respondent with respect

to each and every disputed issue of fact and the inferences to be drawn therefrom." Petition, p. 9. To the contrary, as already noted, the Court of Appeals found no material "disputed issues of fact" lurking in LeBlanc's conclusory and improbable assertions. He later asserts that the Court of Appeals' "rationale was strained and often at odds with common sense." Petition, p. 23. As the Court of Appeals recognized, it was LeBlanc's thesis (based upon a misleading and inaccurate reading of the record) that Conte, the decisionmaker in this case, suddenly developed an aversion to older people less than two years after promoting LeBlanc, which defied logic and common sense. In any event, LeBlanc's factual criticisms, which are ably addressed by the Court of Appeals, merely underscore the uniqueness of this case and its utter lack of broader legal significance.[10]

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[10] LeBlanc's critique of the decision below (Petition, pp. 4-7, 23-24) contains numerous misleading or factually inaccurate statements. *First*, LeBlanc's statement (Petition, p. 23) that at some point in 1991 the total number of employees was the same as in 1990 distorts the undisputed fact that in the fall of 1990 Conte eliminated five positions laying off three individuals. *Second*, LeBlanc's reference (Petition, p. 23) to Great American advertising to fill fourteen positions in the fall of 1990 is blatantly and deliberately misleading. Most of those positions were not even in commercial lines and, thus, were outside Conte's control or budget. The others were positions already in the budget for which LeBlanc was ineligible. A96-97. *Third*, LeBlanc's contention (Petition, pp. 5-6) that eastern Massachusetts was profitable by some measures is demonstrably false. LeBlanc deliberately relies upon records he knows reflect Great American's personal lines performance, not just the commercial lines performance narrowly relevant to this lawsuit. Those same records also fail to account for the onerous residual assessments imposed by the state of Massachusetts. A94-95. *Finally*,

D. The Court Of Appeals Was Not Obligated To Consider LeBlanc's Statistical Evidence Under A Disparate Impact Theory Never Raised Below And Patently Inconsistent With LeBlanc's Theory Of The Case

LeBlanc also contends that the Court of Appeals erred by not considering his statistical evidence under a disparate impact theory. Petition, p. 25.[11] Even if, as LeBlanc asserts (Petition, pp. 25-26), this Court has never resolved whether a disparate impact theory is available in an ADEA case, the issue is not ripe for review because LeBlanc concededly never raised it below. As this Court observed in *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988), "[t]his Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *See also, Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court"). The circuit court decisions on which LeBlanc relies are factually distinguishable. *MacPherson v. University of Montevallo*, 922 F.2d 766, 769 n. 1 (11th Cir. 1991) (court notes that plaintiffs had always based their ADEA case on both disparate treatment and disparate impact

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LeBlanc's repeated references to the hiring of AOR's in other portions of the Zone (Petition, pp. 6-7, 23) obscure the critical, undisputed fact that no one additional was hired once Conte was told to cut the budget in August, 1990. A96.

[11] LeBlanc concedes that statistical evidence has little bearing on a disparate treatment case because "statistical evidence tends to address a pattern and practice and not the specific reason offered by the employer for its actions with respect to one employee." Petition, p. 28.

theories) and *Sobel v. Yeshiva University*, 839 F.2d 18, 24-25 (1988), *cert. denied*, 490 U.S. 1105 (1989) (record shows that plaintiff's disparate impact claim "was raised well in advance of trial"). Here, by contrast, it would be patently unfair to permit LeBlanc to raise this theory of recovery for the first time in this Court.

Even if LeBlanc is not procedurally barred from raising this issue, a disparate impact theory clearly does not apply to this case. LeBlanc attempts to have it both ways. As he concedes, in a disparate treatment case "the credibility of the reason advanced by the employer for its actions is the critical issue." Petition, p. 26. He argues repeatedly in the first half of his Petition that Great American's explanation for his discharge lacked credibility. Petition, pp. 12-25. Yet in the second half of his Petition, LeBlanc characterizes that same explanation as "facially neutral." Petition, p. 26. The two positions are logically irreconcilable. It is plain that LeBlanc does not contend a neutral policy adversely affected him and other older employees. Rather, he claims that the specific decision to terminate him was motivated by age bias. Accordingly, it was not error for the Court of Appeals to consider this a disparate treatment case.

CONCLUSION

For all of the foregoing reasons, Great American respectfully requests that this Court deny LeBlanc's Petition for a Writ of Certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

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